



Date: June 30, 1998
Case No.: 97-INA-433

In the Matter of:

Franklin Grill
Employer,

On Behalf of:

Jose Salgado
Alien.

APPEARANCE: Linette Tobin
Silver Spring, Maryland
For Employer and Alien

BEFORE: Lawson, Vittone, and Wood
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien, Jose Salgado, ("Alien"), filed by Employer, Franklin Grill, ("Employer"), pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, Pennsylvania, denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 12, 1996, Employer filed an application for labor certification to enable Alien to fill the position of Cook. (AF 31-38). The job duties for the position are:

Prepare and cook all menu items, including salads, sandwiches, meats, souvlakis and gyros, sauces, and breakfasts according to established procedures and recipes.

(AF 31). The required experience listed on the application was two years experience in the job offered or two years in the related occupation of Cook's Helper. The position was later coded as a Pantry Goods Maker by the Regional Certifying Officer.¹ *Id.*

The CO issued the Notice of Findings ("NOF") on March 10, 1997, proposing to deny certification because the requirement of two years in the position of cook or cook's helper is unduly restrictive now that the position has been re-codified as a pantry goods maker. (AF 25-27). Employer was directed to submit evidence that the requirement arises from a business

¹313.361-014 COOK (hotel & rest.) alternate titles: cook, restaurant

Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital.

GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81

317.684-014 PANTRY GOODS MAKER (hotel & rest.)

Prepares salads, appetizers, sandwich fillings, and other cold dishes: Washes, peels, slices, and mixes vegetables, fruits, or other ingredients for salads, cold plates, and garnishes. Carves and slices meats and cheese. Portions and arranges food on serving dishes. Prepares fruit or seafood cocktails and hors d'oeuvres. Measures and mixes ingredients to make salad dressings, cocktail sauces, gelatin salads, cold desserts, and waffles, following recipes. Makes sandwiches to order [SANDWICH MAKER (hotel & rest.) 317.664-010]. Brews tea and coffee [COFFEE MAKER (hotel & rest.) 317.684-010]. Prepares breakfast and dessert fruits, such as melons, grapefruit, and bananas. Portions fruit sauces and juices. Distributes food to waiters/waitresses to serve to customers. May serve food to customers. May be designated Salad Maker (hotel & rest.) when specializing in making salads.

GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 4 DLU: 81

necessity or reduce the requirements to the DOT standard of over three months up to and including six months. (AF 27).

Employer submitted its rebuttal on April 14, 1997. (AF 18-24). Employer's rebuttal consisted of letters from Employer's attorney and Employer, and a copy of Employer's menu. Although Employer's rebuttal was classified as a "business necessity statement," it actually argues that the position for which labor certification is sought is a Cook, and not a Pantry Goods Maker. (AF 20). Employer asserts that the duties include preparing and marinating meats and poultry, and cooking eggs, omelets, sausage, crab cakes, chicken wings, and Greek dishes. *Id.* Employer further asserts that the restaurant has daily specials which are not listed on the menu and include jambalaya, meatloaf, fish, stew, and shrimp creole. *Id.* Employer's rebuttal also included a catering menu which listed platters consisting of sandwich meats, vegetables, cheese, and fruits. (AF 21).

The CO issued the Final Determination ("FD") on May 16, 1997, denying certification because the CO believed the position was correctly coded as a Pantry Goods Maker, and therefore, Employer had failed to meet its burden of establishing that the two years requirement arises out of business necessity. (AF 15-17).

On June 19, 1997, Employer filed a motion for review which included copies of the daily specials' board at the restaurant. On July 3, 1997, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("Board").

DISCUSSION

This Panel has not considered the documentation submitted by Employer with its request for review as it was not considered by the CO in its denial. Our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27 (c). *See Sharp Screen Supply, Inc.*, 94-INA-214 (May 25, 1995); *ST Systems, Inc.*, 92-INA-279 (Sept. 2, 1993); *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992).

The NOF must specify what the employer must show to rebut or cure the CO's findings; otherwise, the employer is deprived of a full opportunity to rebut. *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989); *Downey Orthopedic Medical Group*, 87-INA-674 (Mar. 16, 1988) (*en banc*). If an unclear or ambiguous NOF causes or contributes to an employer's confusion, the matter may be remanded to the CO for clarification and to give the employer an opportunity to rebut. *See, e.g., Patisserie Suisse, Inc.*, 90-INA-131 (Oct. 16, 1991); *Poultry Classics*, 91-INA-68 (June 21, 1991); *Toys "R" Us*, 89-INA-345 (Dec. 10, 1990).

In the NOF, the CO upheld the recodification of the position from a Cook to a Pantry Goods Maker by the Regional Certifying Officer, but only provided for rebuttal on the issue of the unduly restrictive requirement of two years experience in the position of Cook or Cook's Helper

for the position of Pantry Goods Maker. (AF 27). In rebuttal, Employer argued that the position was a Cook and not a Pantry Goods Maker. (AF 20). In the FD, the CO found that Employer's evidence did not rebut the finding that the position is a Pantry Goods Maker and certification was denied because Employer failed to document the business necessity of the two years experience or delete the requirement. (AF 17).

The two years experience is only an unduly restrictive requirement if the position is correctly codified as a Pantry Goods Maker. If, however, the position is correctly classified as a Cook, the CO's sole basis for denial is no longer at issue.

In this case, the CO should have instructed Employer how it could rebut the CO's finding that the position is not a Cook, but is a Pantry Goods Maker. Further, the CO should also have instructed Employer that if the CO does not accept Employer's rebuttal that the position is correctly classified as a Cook, Employer must establish that its requirement is normal for the job in the U.S. or arises from business necessity. The NOF, however, did not provide Employer the opportunity to rebut the codification by providing clear instructions on how to defend the codification. Therefore, certification was improperly denied.

On remand, the CO is directed to fully consider Employer's evidence that this position is correctly codified as a Cook and not a Pantry Goods Maker, as this Board finds that evidence very persuasive. If the CO still finds that the position is more appropriately classified as Pantry Goods Maker, then the CO shall issue a second NOF which provides clear instructions on defending the codification and on rebutting the CO's finding that two years experience is unduly restrictive for the position of Pantry Goods Maker. If the CO issues a second NOF, the CO may properly raise other issues such as the fact that Alien's qualifying two years of experience is with the same employer, and that this job appears tailored to the Alien. *See Francis Kellogg at al.*, 94-INA-465, 544, 95-INA-68 (Feb. 2, 1998) (*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

SO ORDERED.

For the Panel:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.